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## PERSONAL INJURY: SOME ADMIRALTY RULES APPLICABLE IN OKLAHOMA

W. JAY JONES\*

### PART I

#### *Introduction*

Much has been written in the general maritime field of injuries to seamen. This topic has been covered in comprehensive studies by both students and authorities.<sup>1</sup> Logically, however, the subject has remained virtually untouched by the legal publications of land-locked Oklahoma,<sup>2</sup> but with the advent of commercial water traffic in this state within the near future, the subject can no longer be ignored. It is indeed a very rare occasion when, in the twentieth century, an inland state with no admiralty or maritime case law background suddenly becomes a major "sea" port. The purpose of this

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<sup>1</sup> See Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369 (1967); Kunzel, *The Seaman's Personal Injury Action and the Jury Trial*, 2 SAN DIEGO L. REV. 25 (1965); Comment, *Crew Conduct as Unseaworthiness*, 15 CLEV.-MAR. L. REV. 265 (1966); 18 HAST. L.J. 981 (1967); 4 HOUS. L. REV. 153 (1966); 44 ORE L. REV. 112 (1965); 22 U. MIAMI L. REV. 937 (1968); 13 VILL. L. REV. 187 (1967); 15 W. RES. L. REV. 753 (1964); 75 YALE L.J. 1174 (1966) for some recent materials in this area. See also Boner, *One if by Land, Two if by Sea*, 30 TEX. L. REV. 489 (1952); Freedman, *Current Trends in the Admiralty Law*, 1 NACCA L.J. 67 (1948); Howe, *Rights of Maritime Workers*, 5 NACCA L.J. 146 (1950) for some general discussions concerning seamen's recovery.

<sup>2</sup> See 20 OKLA. L. REV. 303 (1967) for a short note concerning limitation of liability in admiralty and its applicability to Oklahoma.

paper is not merely to resurvey any of these subjects or to rehash old concepts, although some review is necessary, but to focus on some fundamental rules which have developed, through court or legislative action, in the area of injuries to seamen, with the object of presenting some problems and unfamiliar concepts which may confront Oklahoma courts, both state and federal, upon the completion of the Arkansas River Project in the 1970's. Before these peculiar admiralty concepts can be more fully understood some discussion and review of the content of the doctrines to which they apply is necessary. The presentation of these doctrines (including statutory material) is not exhaustive and will touch only on their fundamental bases.

### *Maintenance and Cure*

From time immemorial men have "gone down to the sea in ships" and then, as now, mariners have been injured or have become ill without fault or wilful misconduct on their part. Such seamen have always been accorded relief by the general maritime law, such relief being known as "maintenance and cure," one of the earliest forms of workmen's compensation.<sup>3</sup> Under this doctrine, the seaman who is injured or becomes ill, without fault or wilful misconduct on his part, is entitled, at the shipowner's expense, to his wages to the end of the voyage plus subsistence, lodging, and medical care until the maximum cure obtainable has been reached.<sup>4</sup> Such protection has been afforded seamen since the earliest sea-

<sup>3</sup> 1 M. NORRIS, *THE LAW OF SEAMEN* § 536, at 577 (2nd ed. 1962) ("Maintenance and cure as a workingman's remedy anticipated industrial workmen's compensation by a thousand years.")

<sup>4</sup> See 1 M. NORRIS, *supra* note 3, § 540 (What is Maintenance), § 541 (The Meaning of Cure), § 546 (Of What it Consists), § 551 (Persons Entitled Thereto), § 558 ("In the Service of the Ship"), § 560 (Extent of the Obligation), § 576 (Failure to Pay). See also 13 VILL. L. REV. 187 (1967); Annot., 3 A.L.R.3d 1082 (1965); 13 A.L.R.2d 628 (1950).

faring times.<sup>5</sup> Maintenance and cure is not, and never was, however, an award of compensation for disability or damages suffered,<sup>6</sup> but is merely a means of providing a seaman relief by affording him medical care<sup>7</sup> and treatment and reimbursing him for the cost of maintaining himself during convalescence.

Maintenance and cure which the master owes the mariner is generally thought to arise impliedly out of the nature of the employment, vesting a right in the mariner while imposing a corresponding duty on both the vessel and the shipowner.<sup>8</sup> It is immaterial that the shipowner is free from negligence and that the ship is completely seaworthy.<sup>9</sup> Furthermore, the right to maintenance and cure cannot be contracted away by the seaman.<sup>10</sup> All the injured or sick seaman need show in order to recover maintenance and cure is that he was a member of the crew, that he became ill or was injured while in the service of the ship, and that he was not wilfully negli-

<sup>5</sup> See 1 M. NORRIS, *supra* note 3, §§ 538, 539 for a comprehensive presentation of the doctrine of maintenance and cure as it existed in the earliest sea codes.

<sup>6</sup> *United Fruit Co. v. Sumrall*, 273 F.2d 735 (5th Cir. 1960); *Schybinger v. Interlake S.S. Co.*, 273 F.2d 307 (7th Cir. (1959)); *The Wanderer*, 20 F. 140 (C.C.E.D. La. 1884); *Theall v. Sam Carline, Inc.*, 241 F. Supp. 748 (W.D. La. 1963).

<sup>7</sup> The word "cure" has not been given a literal interpretation by the courts as a complete cure may, in fact, be impossible. Such a duty on the shipowner would, in many cases, be unbearable. See *Calmer S.S. Corp. v. Taylor*, 303 U.S. 525 (1938); *Loverich v. Warner Co.*, 118 F.2d 690 (3rd Cir. 1941), *cert. denied*, 313 U.S. 577 (1941).

<sup>8</sup> *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *De Zon v. American President Lines, Ltd.*, 318 U.S. 660 (1943); *Jones v. Waterman S.S. Co.*, 155 F.2d 992 (3rd Cir. 1946).

<sup>9</sup> *United Fruit Co. v. Sumrall*, 273 F.2d 735 (5th Cir. 1960); *Musgrave v. Bronx Towing Line, Inc.*, 219 F. Supp. 918 (S.D.N.Y. 1963); *Stone v. Marine Transp. Lines, Inc.*, 182 F. Supp. 200 (D. Md. 1960).

<sup>10</sup> *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *De Zon v. American President Lines, Ltd.*, 318 U.S. 660 (1943).

gent. If these three elements are present, the vessel and its owner are absolutely liable for maintenance and cure. The historical basis underlying what at first glance may seem to be an unduly strict liability was ably stated by Justice Rutledge in *Aguilar v. Standard Oil Company*.<sup>11</sup>

From the earliest times, maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements, and the limitations of human adaptability to work at sea, enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working, that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life.

Accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformly have imposed broad responsibilities for their health and safety upon the owners of ships. In this country these notions were reflected early, and have since been expanded, in legislation designed to secure the comfort and health of seamen aboard ship, hospitalization at home and care abroad. The statutes are uniform in evincing solicitude that the seaman shall have at hand the barest essentials for existence. They do this two ways. One is by recognizing the shipowner's duty to supply them, the other by providing care at public expense. *The former do not create the duty. That existed long before the statutes were adopted.* They merely recognize the pre-existing obligation and put specific legal sanctions, generally criminal, behind it.<sup>12</sup>

<sup>11</sup> 318 U.S. 724 (1943).

<sup>12</sup> *Id.* at 727 (the Court's citation and footnotes are omitted and emphasis is added). The Court further set out, very

*Seaworthiness*

Apart from the concept of maintenance and cure, there developed the doctrine of seaworthiness (or unseaworthiness, as the case may be). Under this doctrine, the seaman is not limited to maintenance (food, lodging, wages) and cure (medical care, hospitalization) but "... may recover full indemnity, i.e., compensatory damages."<sup>13</sup> In *The Osceola*,<sup>14</sup> the Supreme Court affirmed the proposition.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. It will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness.<sup>15</sup>

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succinctly, the elements of maintenance and cure.

In the United States this obligation [maintenance and cure] has been recognized consistently as an implied provision in contracts of maritime employment. Created thus with the contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the maritime employer-employee relationship. So broad is the shipowner's obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. *Id.* at 730 (Court's citation and footnotes omitted).

<sup>13</sup> 1 E. BENEDICT, BENEDICT ON ADMIRALTY § 83, at 256 (6th ed. 1940).

<sup>14</sup> 189 U.S. 158 (1903).

<sup>15</sup> *Id.* at 175 (Court's citation omitted).

Therefore, where the ship (or any part thereof) is found to be unseaworthy,<sup>16</sup> an injured seaman may recover actual wages lost, pain and suffering, impairment of future earning capacity, medical expenses, and future physical pain and suffering if reasonably probable.<sup>17</sup>

The doctrine of seaworthiness is not as old as the concept of maintenance and cure but the reasons for its birth and development, as summarized in *The State of Maryland*,<sup>18</sup> were similar.

Seamen are the wards of admiralty, and the policy of maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. In early days, this protection was sufficiently accorded by the enforcement of the right of "maintenance and cure." Vessels and their appliances were of comparatively simple construction, and seamen were in quite as good position ordinarily to judge of the seaworthiness of the vessel as were her owners . . . .

With the advent of steam navigation, however, it was realized, at least in this country, that "maintenance and cure" did not afford to injured seamen adequate compensation in all cases for injuries sustained. Vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. The seaworthiness of the vessel could be ascertained only upon an examination of this machinery and appliances by skilled experts. It was accordingly held that the duty of the vessel and her

<sup>16</sup> See M. NORRIS, MARITIME PERSONAL INJURIES § 54 (2d ed. 1966) for a collection of cases illustrating what the courts have found the term "unseaworthy" to embrace. See also Grundman, *Unseaworthiness and Personal Injuries Ashore*, 17 CLEV.-MAR. L. REV. 481 (1968).

<sup>17</sup> M. NORRIS, *supra* note 16, § 53.

<sup>18</sup> 85 F.2d 944 (4th Cir. 1936).

owners to the seaman, in this new age of navigation, extended beyond mere "maintenance and cure," which had been sufficient in the simple age of sailing ships; that the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition. . . . [The court here referring to *The Osceola*.]<sup>19</sup>

The seaworthiness concept was recognized very early either expressly or impliedly in several federal district court cases<sup>20</sup> and was first laid down by the Supreme Court in *The Osceola*.<sup>21</sup> The "gist" of the doctrine is simply this: "Seaworthiness is a relative concept,<sup>22</sup> depending in each instance on the particular circumstances. The owner owes an *absolute duty to provide a seaworthy vessel*; however the absolute duty is only to furnish a vessel and equipment reasonably fit for

<sup>19</sup> *Id.* at 945 (emphasis added). See also *The H.A. Scandrett*, 87 F.2d 708, 711 (2d Cir. 1937) ("A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put.").

<sup>20</sup> *The A. Heaton*, 43 F. 592 (C.C. Mass. 1890) (shipowners' failure to provide proper equipment results in liability for ensuing injuries; but the Court does not distinguish between negligence and unseaworthiness); *The Julia Fowler*, 49 F. 277 (S.D.N.Y. 1892) (seaman allowed recovery for injuries sustained when rope broke causing him to fall); *The Frank and Willie*, 45 F. 494 (S.D.N.Y. 1891) (negligence of mate in not providing means of unloading cargo safely results in liability for unseaworthiness); *Olson v. Flavel* 34 F. 477 (D. Ore. 1888) (shipowner liable for failure to provide safe equipment). See also *Dixon v. United States*, 219 F.2d 10 (2d Cir. 1955); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, at 315 (1957); Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 386 (1954) for a more thorough historical discussion.

<sup>21</sup> 189 U.S. 158 (1903).

<sup>22</sup> "It [seaworthiness] is relative in the sense that a vessel may be said to be fit for certain purposes and unfit for others." M. NORRIS, *MARITIME PERSONAL INJURIES* § 33, at 66 (2d ed. 1966). For a recent example of the "relative concept" idea see *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964),



their intended use."<sup>23</sup> The Supreme Court has stated: "It [the shipowner's liability for unseaworthiness] is essentially a species of liability without fault. . . . [T]he liability is neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy."<sup>24</sup> If unseaworthiness is found and personal injury results as a proximate result thereof, the shipowner is not relieved of his obligation no matter how diligent and careful he has been<sup>25</sup> and regardless of the fact that he has relinquished control of part of the ship to someone else.<sup>26</sup> Closely allied with the absolute duty concept

*cert. denied*, 379 U.S. 930 (1964) where an ocean going tug sank in the Gulf of Mexico off the coast of Florida during an unanticipated "norther" with winds of "moderate gale" strength 33-36 m.p.h. and "very rough" seas (waves 5' to 12' in height). The Court held, at 194, the ship and lifeboat unseaworthy as a matter of law: "The Tug therefore had to have the capabilities of withstanding winds and seas of that expected power which might arise. . . ." It follows that if the storm had been more severe and/or extraordinary for that time of year, the vessel would not have been "unseaworthy." See also *Compania de Navegacion v. Fireman's Fund Ins. Co.*, 277 U.S. 66 (1928).

<sup>23</sup> *Gibbs v. Kiesel*, 382 F.2d 917, 918 (5th Cir. 1967) (emphasis added).

<sup>24</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946). This case is most cited for its extension of maritime rules to more persons than the immediate crew of the vessel. See also *Hussein v. Isthmian Lines, Inc.*, 405 F.2d 946 (5th Cir. 1968); Annot., 84 A.L.R.2d 620 (1962); 77 A.L.R.2d 829 (1961).

<sup>25</sup> *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Van Carpals v. The S.S. Am. Harvester*, 297 F.2d 9 (2d Cir. 1961).

<sup>26</sup> *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954). The older cases had provided some authority that the duty to furnish a seaworthy vessel and equipment was imposed upon the shipowner exclusively by virtue of the implied warranty in the employment contract between shipowner and seaman. Cf. *Hamilton v. United States*, 268 F. 15 (4th Cir. 1920); *Rainey v. New York & Pac. S.S. Co.*, 216 F. 449 (9th Cir. 1914).

of unseaworthiness is the rule that the duty is nondelegable.<sup>27</sup> The most noted of the recent cases in this area is *Mitchell v. Trawler Racer, Inc.*,<sup>28</sup> which extended the doctrine of seaworthiness to apply to temporary unseaworthy conditions which arise after the vessel leaves its home port as well as to those which are permanent and exist prior to departure.<sup>29</sup>

### *Statutory Provisions*

A third avenue for recovery open to an injured seaman is provided by statute.<sup>30</sup> Only by virtue of the statutes has the mariner been able to recover damages for injuries sustained as a result of the negligence of the master or of a fel-

<sup>27</sup> The H.A. Scandrett, 87 F.2d 708 (2d Cir. 1937); Christopher v. Grueby, 40 F.2d 8 (1st Cir. 1930). This rule paved the way for the holding in *Sieracki*.

<sup>28</sup> 362 U.S. 539 (1960). Prior to *Mitchell*, there was some authority to the effect that the temporary presence of an injury causing substance, arising after commencement of the voyage, on the ship's deck or stairway does not render the ship unseaworthy. This reasoning was based on the theory that the shipowner had no knowledge of, or control over, such transitory defects arising after the vessel put to sea. Cf. *Cookingham v. United States*, 184 F.2d 213 (3rd Cir. 1950). See also *Hamilton v. United States*, 268 F. 15 (4th Cir. 1920) for the possible effect of the Harter Act [46 U.S.C. § 190 (1964)] on the court's reasoning in personal injury matters. That act relieved the shipowner of strict liability for cargo damage caused by negligence of master or crew during the voyage, so long as the shipowner used due diligence in providing a seaworthy ship or in manning her.

<sup>29</sup> The way was paved for *Mitchell* by *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955) and *Alaska S.S. Co. v. Pettersson*, 347 U.S. 396 (1954), which seriously undermined the "transitory condition" exception to unseaworthiness. *Boudoin* held that the mere fact that the shipowner has no knowledge of the defect and no opportunity to correct same would not relieve him of liability for unseaworthiness.

<sup>30</sup> See 2 M. NORRIS, *THE LAW OF SEAMEN* §§ 654-656 (2d ed. 1962) for a brief survey of statutory enactments in the United States.

low seaman.<sup>31</sup> The Merchant Marine Act of 1920 (The Jones Act)<sup>32</sup> gives the injured seaman an in personam action at law for damages against his employer in addition to the heretofore mentioned remedies available to him under admiralty law.<sup>33</sup> The statute will in some instances overlap the doctrines of maintenance and cure and seaworthiness, enabling the injured seaman to seek recovery under a combination of the three remedies.<sup>34</sup> Additional statutory material is considered in Part III following.

<sup>31</sup> The *Osceola*, 189 U.S. 158, 175 (1903) ("4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received from negligence or accident."). Note that this decision was handed down seventeen (17) years prior to passage of the Jones Act.

<sup>32</sup> 46 U.S.C. § 688 (1964). This act was upheld as constitutional by *Panama R.R. v. Johnson*, 264 U.S. 375 (1924). The Act provides, in part as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

<sup>33</sup> *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928); *The H.A. Scandrett*, 87 F.2d 708 (2d Cir. 1937).

<sup>34</sup> See 1 E. BENEDICT, *supra* note 13, § 25 for a more exhaustive treatment of the statutory material. In addition, there are a number of other statutes and regulations pertaining to

## PART II

The foregoing material has presented the high points of the three basic remedies available to an injured mariner: maintenance and cure, unseaworthiness, and the Jones Act. Part II of this article will be devoted to some unusual concepts inherent in these three remedies which will confront Oklahoma courts upon the completion of the Arkansas River Navigation Project. Injured and ill seamen will be seeking recovery under the remedies discussed above. What are some of the rules applicable to these remedies with which Oklahoma courts may not be familiar?

*Assumption of Risk*

The concept that the seaman is barred from recovery because he has assumed the risk of his voluntary employment is not recognized as a defense in a suit for maintenance and cure,<sup>35</sup> unseaworthiness,<sup>36</sup> or under the Jones Act.<sup>37</sup> With regard to maintenance and cure, the United States Supreme Court in *Aguilar* said, "So broad is the shipowner's obligation, that negligence . . . on the seaman's part will not relieve him [the shipowner] of the responsibility. Conceptions of contributory negligence, the fellow-servant doctrine, and assumption

ship safety and inspection. For example, see 46 C.F.R. §§ 113, 114, 119 (1939), Coast Guard regulations which set out detailed equipment which river vessels must provide. See also Carrere, *An Act Named Jones*, 15 LA. B.J. 95 (1967).

<sup>35</sup> *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943), *Couts v. Erickson*, 241 F.2d 499 (5th Cir. 1957).

<sup>36</sup> *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939) as applied by *Hildebrand v. United States*, 134 F. Supp. 514 (S.D.N.Y. 1954), *aff'd*, 226 F.2d 215 (2d Cir. 1955); *Niccoli v. Den Norske Afrika-Og Australielinie*, 332 F.2d 651 (2d Cir. 1964); *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457 (4th Cir. 1963).

<sup>37</sup> *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Green v. Orion Shipping & Trading Co.*, 139 F. Supp. 431 (D. Md. 1956).

of risk have no place in the liability or defense against it."<sup>38</sup> In *Mahnich v. Southern Steamship Company*,<sup>39</sup> the Supreme Court stated by way of dictum as to unseaworthiness: "Whether petitioner knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances."<sup>40</sup> Previously, the Supreme Court had held, in a case involving the issue of whether assumption of risk would bar recovery by an injured seaman under the Jones Act: "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence . . . ."<sup>41</sup> "We think that the . . . responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk . . . ."<sup>42</sup>

It has long been the rule in Oklahoma that an employee, voluntarily entering into an employment contract, assumes all the risks ordinarily incident to his employment and the risks which may arise from obvious defects in the work place

<sup>38</sup> 318 U.S. at 730. The quoted language as to assumption of risk is probably dicta, since this case involved the question of whether or not the injured seaman was "in the service of his ship."

<sup>39</sup> 321 U.S. 96 (1944).

<sup>40</sup> *Id.* at 103. This language, although dicta, was adopted in the cases cited in note 36 *supra*. In particular, in *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 462 (4th Cir. 1963), the court said: "If the doctrine of seaworthiness means anything, it is totally repugnant to the doctrine of assumption of risk on the part of seamen."

<sup>41</sup> *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939). See also *DuBose v. Matson Navigation Co.*, 403 F.2d 875 (9th Cir. 1968).

<sup>42</sup> *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 432 (1939).

or equipment.<sup>43</sup> This includes extraordinary risks incident to the employment which arise from the employer's negligence and of which the employee had, or should have had, knowledge.<sup>44</sup> But the servant does not assume the risks inherent in unusual hidden defects caused by the employer's negligence.<sup>45</sup> Furthermore, where an employer violates a safety statute, the defense of assumption of risk is not available to him even though the employee may know of such violation.<sup>46</sup> With the passage of Oklahoma's Workmen's Compensation Act,<sup>47</sup> however, assumption of risk lost much of its force as the Act expressly abolishes assumption of risk as a defense where the Act is applicable. It should be noted, however, that, with one possible exception, seamen are not covered by the Act.<sup>48</sup>

It is readily apparent that although assumption of risk

<sup>43</sup> *Osage Coal & Mining Co. v. Sperra*, 42 Okla. 726, 142 P. 1040 (1914); *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 P. 657 (1910), *petition for cert. dismissed*, 225 U.S. 697 (1912). *San Bois Coal Co. v. Janeway*, 22 Okla. 425, 99 P. 153 (1908). See generally, *Symposium on the Law of Torts*, 19 OKLA. L. REV. 305-357 (1966).

<sup>44</sup> *H.F. Wilcox Oil & Gas Co. v. Jamison*, 199 Okla. 691, 190 P.2d 807 (1948); *Kansas City, M. & O. Ry. v. Costa*, 69 Okla. 132, 170 P. 892 (1918). But the employee must use reasonable care and prudence to discover obvious defects: *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 P. 657 (1910), *petition for cert. dismissed*, 225 U.S. 697 (1912).

<sup>45</sup> *Haynie v. Haynie*, 426 P.2d 717 (Okla. 1966); *Donahoe v. Moulton*, 300 P.2d 655 (Okla. 1956); *Oklahoma Natural Gas Co. v. Walker*, 269 P.2d 327 (Okla. 1953); *Midland Valley R.R. v. Cox*, 69 Okla. 123, 170 P. 485 (1916).

<sup>46</sup> *Connelly v. Jennings*, 207 Okla. 554, 252 P.2d 133 (1952); *cert. denied*, 345 U.S. 921 (1953); *Bartlesville Zinc Co. v. James*, 66 Okla. 24, 166 P. 1054 (1917); *Harris Irby Cotton Co. v. Duncan*, 57 Okla. 761, 157 P. 746 (1915).

<sup>47</sup> OKLA. STAT. tit. 85 § 2-176 (1954), *as amended*. See text material on Part III *infra*.

<sup>48</sup> OKLA. STAT. tit. 85 § 2 (Supp. 1968). Note that the Act does apply to employees engaged in the "hazardous employment" of working on dredges. This is the exception referred to in the text preceding this note.

would ordinarily preclude recovery in negligence cases (other than workmen's compensation matters) litigated in Oklahoma an attempted application of the doctrine to the case of an injured seaman would run afoul of this traditional Admiralty remedies where assumption of risk is not a recognized defense. This seeming conflict is resolved in favor of the admiralty rules. *Garrett v. Moore-McCormack Company*<sup>49</sup> is considered as authority for the proposition that state courts must apply the admiralty doctrine in lieu of their own common law rules.<sup>50</sup> The Supreme Court stated in *Garrett*: "... [S]tate courts may not apply their doctrines of assumption of risk in actions arising under the Act."<sup>51</sup> It goes without saying that federal courts sitting in Oklahoma will, in applying the substantive law of Oklahoma (where the cause of action arose), apply the appropriate admiralty rules or the Jones Act, as the case may be, since that will be the substantive law Oklahoma courts would apply.

#### *Contributory and Comparative Negligence*

Although the defense of assumption of risk is not available to the shipowner in admiralty or in law under the Jones Act, the concept of comparative negligence (or proportionate fault) may be a defense in suits brought for recovery under the doctrine of unseaworthiness or under the Jones Act, not as an

<sup>49</sup> 317 U.S. 239 (1942).

<sup>50</sup> See M. NORRIS, MARITIME PERSONAL INJURIES, § 44, at 97 (2d ed. 1966).

<sup>51</sup> 317 U.S. at 244. Although the Court was declaring a ban on imposition of state assumption of risk rules in actions brought under the Jones Act, the writer agrees with Mr. Norris, *supra* note 50, that the prohibition likewise extends to suits brought for maintenance and cure and for recovery under unseaworthiness. Otherwise, there could, in effect, be no recovery for maintenance and cure and no recovery under unseaworthiness in actions brought in state courts where the shipowner was not negligent. See the text material under Contributory and Comparative Negligence and the material contained in note 59 *infra* for additional comments on this point.

absolute bar to recovery but only in mitigation of damages.<sup>52</sup> Contributory negligence is not a defense either in admiralty suits for unseaworthiness or under the Jones Act except in mitigation of damages.<sup>53</sup> Therefore, when the seaman is suing under either unseaworthiness or the Jones Act, he will be denied recovery to the extent his own negligence contributed to his injury. The proportion of the libellant's fault is applied to, and a deduction made from, the total damages awarded.<sup>54</sup>

On the other hand, it is well settled in personal injury cases litigated in Oklahoma courts, that if the one seeking recovery was contributorily negligent in the slightest degree, he is absolutely barred from recovery.<sup>55</sup> Furthermore, as a corol-

<sup>52</sup> *Unseaworthiness*: *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539 (2d Cir. 1966); *Bryant v. Partenreederei-Ernest Russ*, 352 F.2d 614 (4th Cir. 1965); *Nicrolis v. Den Norske Afrika-Og Australielinie*, 332 F.2d 651 (2d Cir. 1964); *Santomarco v. United States*, 277 F.2d 255 (2d Cir. 1960). *Jones Act*: *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *Tuttle v. American Oil Co.*, 292 F.2d 123 (4th Cir. 1961); *Ahlgren v. Red Star Towing & Transp. Co.*, 214 F.2d 618 (2d Cir. 1954); *Mitchell v. Reading & Bates Exploration Co.*, 239 F. Supp. 516 (E.D. Tex. 1965).

<sup>53</sup> *Unseaworthiness*: *United N.Y. & N.J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U.S. 613 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539 (2d Cir. 1966). *Jones Act*: *Jacob v. New York City*, 315 U.S. 752 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *DuBose v. Matson Navigation Co.*, 403 F.2d 875 (9th Cir. 1968); *Ammar v. American Export Lines, Inc.*, 326 F.2d 955 (2d Cir. 1964).

<sup>54</sup> See *Pisano v. The S.S. Benny Skou*, 220 F. Supp. 901 (S.D.N.Y. 1963), *aff'd.*, 346 F.2d 993 (2d Cir. 1965) where the injured seaman was found to be 100% negligent and therefore was denied any recovery.

<sup>55</sup> *F.W. Woolworth Co. v. Davis*, 41 F.2d 342 (10th Cir. 1930), *cert. denied*, 282 U.S. 859 (1930); *Rader v. Fleming*, 429 P.2d 750 (Okla. 1967); *Barbe v. Barbe*, 378 P.2d 314 (Okla. 1962); *Thorp v. St. Louis & S.F.R.R.*, 73 Okla. 123, 175 P. 240 (1918). See generally *Symposium on the Law of Torts*, 19 OKLA. L. REV. 305-357 (1966). Note however that, as was



lary to that rule, the doctrine of comparative negligence is not recognized in Oklahoma.<sup>56</sup> In other words, as to these points Oklahoma law is in complete opposition to the corresponding admiralty rules applicable to unseaworthiness and to the federal rules regarding negligence under the Jones Act. But again Oklahoma law must yield to federal maritime law when Oklahoma courts entertain seamen's injury cases. In *Beadle v. Spender*,<sup>57</sup> the question before the United States Supreme Court was whether California's common law or the traditional admiralty rules would apply in a case of a seaman's injury. The Court stated that "The rules, peculiar to admiralty, of liability for injuries to seamen or others, are as applicable when the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored."<sup>58</sup> *Garrett*, mentioned above concerning assumption of risk, also discussed the applicability of admiralty rules of contributory and comparative negligence:

This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.'

the case with assumption of risk, Oklahoma's Workmen's Compensation Act, where applicable, has expressly abolished the defense of contributory negligence. But with possibly one exception, the Act is not now applicable to seamen's injuries. OKLA. STAT. tit. 85, §§ 2, 12 (1954). See the text material in Part III following.

<sup>56</sup> *Rader v. Fleming*, 429 P.2d 750 (Okla. 1967); *Barbe v. Barbe*, 378 P.2d 314 (Okla. 1962); *Public Serv. Co. v. Sanders*, 362 P.2d 90 (Okla. 1961); *Mount v. Nichols*, 198 Okla. 282, 177 P.2d 1013 (1947); *Gourley v. Oklahoma City*, 104 Okla. 210, 230 P. 923 (1924).

<sup>57</sup> 298 U.S. 124 (1936).

<sup>58</sup> *Id.* at 129 (Court's citations omitted). This is probably dicta as to contributory negligence since the principal question on appeal concerned the trial court's instructions regarding assumption of risk.

....

In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law.

....

It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is the national, not the state, government. If by its practice the state courts were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights. . . .<sup>59</sup>

<sup>59</sup> 317 U.S. at 244 (Court's quotations and citations omitted). Although this case involved a suit for maintenance and cure and for recovery under the Jones Act and not specifically under unseaworthiness, Norris cites this case as also being applicable to suits for unseaworthiness: M. NORRIS, MARITIME PERSONAL INJURIES § 44, at 97 (2d ed. 1966). It is submitted that this is correct in view of the Court's reference to the general "admiralty law" and "admiralty principles" and the fact that the holding is squarely applicable to maintenance and cure. It would be anomalous for state courts to be forbidden from applying their own rules as to maintenance and cure while at the same time being permitted to do so as to unseaworthiness. *Accord*, *Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n.*, 251 F.2d 708, 713 (2d Cir. 1958). (The *Halecki* court, relying on *Garrett* and on *Pope & Talbot Inc. v. Hawn*, 346 U.S. 406 (1953) said: "[R]ights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence *whether suit upon it is in the admiralty or in an action at law, state or federal.*") (emphasis added). Here plaintiff had sued in a federal court in New Jersey under the doctrine of unseaworthiness and for negligence. Held: The New Jersey Death Statute (N.J.S.A. 2A: 31-1) under which contributory negligence was a complete bar, was inapplicable. *But see* *Belden v. Chase*, 150 U.S. 674 (1893).

The Supreme Court concluded:

The Pennsylvania Supreme Court has concluded that in solving problems of procedural, as distinguished from substantive, law, the law court may apply its own doctrine . . . .

Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action at law is incompatible with the conclusion of the court below.<sup>60</sup>

In actions for maintenance and cure, state courts must also apply the admiralty rules in lieu of their own common law.<sup>61</sup> Therefore, the Oklahoma rule barring recovery when contributory negligence is present will be inapplicable in state courts in this area. So long as the seaman did not bring on his injury or illness by his own wilful conduct, he may recover maintenance and cure in Oklahoma courts, no matter how negligent he was. Federal courts sitting in Oklahoma will, of course, also apply the appropriate admiralty or federal law.

#### *Res Ipsa Loquitur*

Federal courts, in particular the Circuit Court of Appeals for the Fifth Circuit, have from time to time spoken in terms of *res ipsa loquitur*.<sup>62</sup> One of the most recent cases was *Gibbs v. Kiesel*<sup>63</sup> which involved an action for injuries caused by an unseaworthy vessel. The court said:

This Court has specifically approved the application of *res ipsa loquitur* reasoning to an action for unseaworthiness, noting that the logical inference is often that the gear or appurtenance would not have broken had it not been defective.<sup>64</sup>

<sup>60</sup> 317 U.S. at 248.

<sup>61</sup> *The Osceola*, 189 U.S. 158 (1903); *Paul v. United States*, 205 F.2d 38 (3d Cir. 1953); *Cornell Steamboat Co. v. Fallon*, 179 F. 293 (2d Cir. 1909); *The City of St. Louis*, 56 F. 720 (E.D. La. 1893); *The Ben Flint*, 3 F. Cas. 183 (No. 1299) (D. Wis. 1967).

<sup>62</sup> See generally Annot., 1 A.L.R.3d 642 (1965).

<sup>63</sup> 382 F.2d 917 (5th Cir. 1967).

<sup>64</sup> *Id.* at 919.

By way of footnote the Court added:

But note that the doctrine of *res ipsa loquitur* in admiralty cases is only similar to the doctrine in ordinary tort law. One distinction is that *res ipsa loquitur* in tort law requires that the accident be one that would not ordinarily occur without negligence. The negligence concept plays no part in unseaworthiness. . . .<sup>65</sup>

The prior case of *Walker v. Harris*<sup>66</sup> also discussed this concept:

. . . [S]inking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear.<sup>67</sup>

The traditional land oriented doctrine of *res ipsa loquitur* is said to involve the following elements: "(1) The event must be of a kind which does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it

<sup>65</sup> *Id.* Here the court was referring to *Van Carpals v. The S.S. Am. Harvester*, 297 F.2d 9, 11 (2d Cir. 1961) which also discussed this concept: "That doctrine [*res ipsa loquitur*] may be applicable in ship cases . . . but here resort to it as normally conceived is not necessary. For it is customary to state certain requirements for or limitations upon the application of *res ipsa loquitur* . . . which have no place (or are automatically supplied) in the absolute duty of the shipowner (quite apart from theories of negligence) to provide a seaworthy ship." *Van Carpals v. The S.S. Am. Harvester*, *supra*, at 11.

<sup>66</sup> 335 F.2d 185 (5th Cir. 1964), *cert. denied*, 379 U.S. 930 (1964).

<sup>67</sup> *Id.* at 193. See also *Johnson v. United States*, 333 U.S. 46 (1948) for a discussion by the United States Supreme Court of the applicability of the doctrine to Jones Act cases.

must not have been due to any voluntary action or contribution on the part of the plaintiff."<sup>68</sup> This doctrine, in the form set out above, is recognized in Oklahoma,<sup>69</sup> but an examination of the cases will reveal that the rule is generally not applicable as between master and servant.<sup>70</sup> Ordinarily, the mere fact that the employee is injured during the course of his employment will not give rise to a presumption of the employer's negligence. The employee must affirmatively show negligence of the employer in order to recover.<sup>71</sup> The primary reason for the inapplicability of the rule as between employee and his employer is the difficulty of showing the second element above, i.e. that the control of the instrumentality causing the injury was *exclusively* in the defendant-employer. Likewise, it may be difficult for plaintiff-employee to negate the possibility of his own contributory negligence, especially if his injury is caused by machinery or tools with which he is working. *Res*

<sup>68</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 218 (3rd ed. 1964). See also F. HARPER, A TREATISE ON THE LAW OF TORTS § 77, at 182 (1940) where it states: "But negligence may be shown by circumstantial evidence. If the facts and circumstances relied upon to sustain the allegation of negligence are closely and immediately connected with the accident there is said to arise a presumption of negligence which is described as a case in which *res ipsa loquitur*. In such a case, all that is necessary for the plaintiff to do is to prove the fact of the harm and the circumstances under which it occurred."

<sup>69</sup> *Hardware Mut. Ins. Co. v. Lukken*, 372 F.2d 8 (10th Cir. 1967); *J.C. Penny Co. v. Eubanks*, 294 F.2d 519 (10th Cir. 1961); *Duncan v. United States*, 98 F. Supp. 483 (E.D. Okla. 1951); *Smith v. Vanier*, 307 P.2d 539 (Okla. 1957).

<sup>70</sup> *Sanders v. McMichael*, 200 Okla. 501, 197 P.2d 280 (1948); *Missouri Okla. & Gulf Ry. v. West*, 50 Okla. 521, 151 P. 212 (1915); *Smith v. Acme Milling Co.*, 34 Okla. 439, 126 P. 190 (1912).

<sup>71</sup> *Speed v. Whalin*, 386 P.2d 772 (Okla. 1963); *Sears, Roebuck & Co. v. Skeen*, 207 Okla. 180, 248 P.2d 582 (1952); *Wright v. Atchison, T. & S.F. Ry.*, 170 Okla. 48, 38 P.2d 517 (1934); *Grand v. St. Louis-San Francisco Ry.*, 97 Okla. 111, 221 P. 80 (1924).

*ipsa loquitur* has been traditionally applied in Oklahoma to actions brought to recover damages for injuries incurred by eating or drinking food or liquids defectively or impurely packaged<sup>72</sup> and for certain injuries sustained by members of the public in public or private places.<sup>73</sup> Furthermore, it is recognized in Oklahoma that *res ipsa loquitur* is a rule of evidence only which, when applicable, gives rise to a rebuttable presumption of negligence, there being no concept of liability without fault involved in the doctrine.<sup>74</sup>

It would appear then, that the time honored doctrine of *res ipsa loquitur*, as applied to certain negligence cases arising on land, would be completely superfluous to the basic concepts of absolute liability underlying the admiralty rules of maintenance and cure and unseaworthiness which involve no conceptions of negligence. As to suits brought under the Jones

<sup>72</sup> Oklahoma Coca-Cola Bottling Co. v. Dillard, 208 Okla. 126, 253 P.2d 847 (1953); Oklahoma Coca-Cola Bottling Co. v. Newton, 205 Okla. 360, 237 P.2d 627 (1951).

<sup>73</sup> See Norman v. Greenland Drilling Co., 403 P.2d 507 (Okla. 1965) (pollution of plaintiff's land, water well, and pond by defendant's drilling operations); Transcontinental Bus Sys., Inc. v. Simons, 367 P.2d 160 (Okla. 1961) (plaintiff-passenger injured when door to luggage compartment of defendant's bus fell on plaintiff's head); Oklahoma Natural Gas Co. v. Colvert, 260 P.2d 1076 (Okla. 1953) (fire damage to plaintiff's home resulting from excessive gas pressure caused by defective regulator in defendant's gas line); Terrell v. First Nat'l Bank & Trust Co., 204 Okla. 24, 226 P.2d 431 (1950) (defective door on defendant's bank injured plaintiff); Keefer v. Public Serv. Co., 185 Okla. 94, 90 P.2d 409 (1939) (plaintiff's decedent injured by defendant's downed wire); J.C. Penny Co. v. Forrest, 183 Okla. 106, 80 P.2d 640 (1938) (defective machinery in defendant's store injured plaintiff-customer).

<sup>74</sup> Downs v. Longfellow Corp., 351 P.2d 999 (Okla. 1960); Laffoon Oil Co. v. Flanagan, 330 P.2d 194 (Okla. 1958); Smith v. Vanier, 307 P.2d 539 (Okla. 1957); Keefer v. Public Serv. Co., 185 Okla. 94, 90 P.2d 409 (1939); Carter Oil Co. v. Independent Torpedo Co., 107 Okla. 209, 232 P. 419 (1924).

Act, where the seaman must plead and prove negligence, the doctrine would also be inapplicable in most instances since it is generally not available to an employee as against his employer for injuries arising out of the employment. The only conceivable situation where the doctrine might be applicable is in an action brought under the Jones Act by a longshoreman who is not an employee of the shipowner.<sup>75</sup> It is submitted that federal courts in using the term "*res ipsa loquitur*," in actions by seaman-employee against shipowner-employer, have done so loosely and incorrectly especially in actions based on the doctrine of unseaworthiness which does not include the element of negligence. The most that can be said for the applicability of the doctrine in maritime cases is that the rule, in some hybrid form, may be applied to raise a presumption of unseaworthiness.<sup>76</sup>

### PART III

#### *The Applicability of Admiralty to Oklahoma*

At this point the reader may well be thinking: "All this is well and good, but surely rules of admiralty, traditionally applicable to ocean-going clipper ships of the past as well as today's luxury liners and cargo ships, will not be equally relevant in matters involving small inland tugs and barges operating on the Arkansas River and its tributaries." But the general maritime law *will* apply at the Port of Catoosa at Tulsa much as it would apply in mid-ocean.

The United States Constitution originally placed admiralty jurisdiction in the federal judiciary.<sup>77</sup> Later, by statute and Supreme Court decision, admiralty jurisdiction was extended

<sup>75</sup> See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) which extended the jurisdiction of admiralty to certain longshoremen.

<sup>76</sup> See *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964) as discussed in the text of this article in conjunction with note 66 *supra*.

<sup>77</sup> U.S. CONST. art. III, § 2.

to all navigable waterways.<sup>78</sup> Very early the Supreme Court held a man-made canal to be a navigable waterway subject to federal admiralty jurisdiction.<sup>79</sup>

Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State.<sup>80</sup>

Furthermore, it is not necessary that the "vessel" in question be an ocean-going ship in the traditional sense.<sup>81</sup> The Supreme

<sup>78</sup> The Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 extended admiralty jurisdiction, as conferred by the Constitution (see note 77 *supra*), to the Great Lakes and connecting waters. The Supreme Court held in *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296 (1957) and in *The Hine v. Trever*, 71 U.S. (4 Wall) 555 (1866) that federal district courts could exercise jurisdiction over admiralty cases arising on navigable waters under authority of the Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76. The Act of 1845 was therefore bypassed and as it was deemed superfluous, it was later repealed (Act of Aug. 5, 1909, ch. 6 § 28, 36 Stat. 104); see note 103 *infra* for a historical survey of Congressional action in the area of admiralty jurisdiction.

<sup>79</sup> *Ex Parte Boyer*, 109 U.S. 629 (1884).

<sup>80</sup> *Id.* at 632. See also *Davis v. United States*, 185 F.2d 938 (9th Cir. 1950); Annot., 17 Ann. Cas. 349 (1910).

<sup>81</sup> See *Charles Barnes Co. v. One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909) for a discussion of what is and what is not a "vessel." The district court said: "So frequently navigable structures intended for transportation have been held to be vessels, though without means of propulsion aboard and yet not propelled by the wind." *Charles Barnes Co. v. One Dredge Boat*, *supra* at 896 (emphasis added).



Court held long ago, in *The Robert W. Parsons*,<sup>82</sup> that a canal-boat is a "vessel" within admiralty jurisdiction. Congress also has spoken in this area, defining a "vessel" subject to admiralty jurisdiction as ". . . All water craft and other artificial contrivances of whatever description and at whatever stage of construction . . . which are used or are capable of being or are intended to be used as a means of transportation on water."<sup>83</sup>

There is no clear-cut definition of exactly who is a "seaman" within admiralty jurisdiction. However, it is clear, from an examination of the cases, that the term is not limited to the traditional mariner on the high seas.<sup>84</sup> In *Nelson v. Greene Line Steamers, Inc.*,<sup>85</sup> the Sixth Circuit Court of Appeals succinctly stated the three elements of a "seaman." "[T]he test to be applied in determining whether an employee is a 'seaman' within the meaning of the [Jones] Act is (1) that the vessel be in navigation, (2) that there be more or less permanent connection with the vessel, and (3) that the worker be aboard primarily to aid in navigation. This is a matter depending largely upon the facts of the particular case."<sup>86</sup> In this case the worker in question, a deckhand and carpenter's helper on a Mississippi River excursion boat, was held

<sup>82</sup> 191 U.S. 17 (1903).

<sup>83</sup> 46 U.S.C. § 801 (1964).

<sup>84</sup> See generally M. NORRIS, MARITIME PERSONAL INJURIES §§ 1, 51 (2nd ed. 1966); Annot., 75 A.L.R.2d 1312 (1961).

<sup>85</sup> 255 F.2d 31 (6th Cir. 1958), cert. denied, 358 U.S. 867 (1958).

<sup>86</sup> *Id.* at 33 (court's citations omitted). As to what constitutes "aiding in navigation," the Sixth Circuit had previously said: "A review of the cases supports our conclusion that 'aiding in navigation' is not confined to those who can 'hand, reef and steer,' but applies to all whose duties contribute to the operation and welfare of the vessel." *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 388 (6th Cir. 1953), cert. denied, 346 U.S. 817 (1953). See also *Bodden v. Coordinated Caribbean Transp., Inc.*, 369 F.2d 273 (5th Cir. 1966), for an almost identical wording, by the Fifth Circuit, of the elements of a "seaman."

not to be a "seaman" because the first element was not present, that is, the vessel was not in navigation.<sup>87</sup> It appears that this is the most important consideration. If the ship is "in navigation" at the time the injury is incurred, federal courts will tend to hold any injured worker to be a "seaman."<sup>88</sup> As The Fifth Circuit once stated: "As a result of the cases, we feel constrained to hold that one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act."<sup>89</sup>

Also, the mere fact that the "voyage" is of short duration and distance is not controlling in all instances.<sup>90</sup> As was held in *Weiss v. Central Railroad Company*:<sup>91</sup>

We know of no authority, however, for holding that a seaman is not entitled to the traditional privileges of his status merely because his voyages are short, because he sleeps ashore, or for other reasons his lot is more pleasant than that of most of his brethren. Furth-

<sup>87</sup> As to when a ship is "in navigation," the Fifth Circuit stated: "The nautical phrase, 'plying in navigable waters' does not mean that the vessel must, at the very moment of the injury, have been actually in motion on navigable waters." *McKie v. Diamond Marine Co.*, 204 F.2d 132, 134 (5th Cir. 1953).

<sup>88</sup> *Magnolia Towing Co. v. Pace*, 378 F.2d 12 (5th Cir. 1967) (pilot is a "seaman"); *Putnam v. Lower*, 236 F.2d 561 (9th Cir. 1956) (fisherman is a "seaman"); *Gahagan Constr. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948), *cert. denied*, 333 U.S. 876 (1948) (deckhand is a "seaman"); *Bailey v. City of N.Y.*, 55 F. Supp. 699 (S.D.N.Y. 1944), *aff'd.*, 153 F.2d 427 (2nd Cir. 1946) (engineer is a "seaman"); *Militano v. United States*, 55 F. Supp. 904 (S.D.N.Y. 1943) (stevedore is a "seaman"). *But see* *Continental Gas Co. v. Thornden Line*, 186 F.2d 992 (4th Cir. 1951); *The Navemar*, 41 F. Supp. 846 (E.D.N.Y. 1941) (purser is a "seaman").

<sup>89</sup> *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941).

<sup>90</sup> See the text quotation from *Ex Parte Boyer* cited in note 80 *supra*.

<sup>91</sup> 235 F.2d 309 (2nd Cir. 1956).

er, so to hold would be to create a genre of 'seamen' ineligible for the benefits of maintenance and cure, yet equally barred from recovery under the Longshoremen's Act.<sup>92</sup>

Here the court held that a part time deckhand working on a ferryboat crossing the Hudson River from New York to New Jersey was a "seaman" entitled to recover maintenance and cure.<sup>93</sup>

#### *Federal or State Jurisdiction and Workmen's Compensation*

As was previously pointed out in connection with the discussion of assumption of risk and contributory negligence, where state law is in conflict with applicable admiralty principles, the former will generally yield to the latter.<sup>94</sup> The Supreme Court early held that no state law may be applied in admiralty when the state law is in opposition to the federal law.<sup>95</sup> More recently, in *Pope and Talbot, Inc. v. Hawn*,<sup>96</sup>

<sup>92</sup> *Id.* at 313. Note that the court specifically refers to maintenance and cure where the cases previously cited were principally concerned with the Jones Act. The court further stated: "Generally the criteria for determining whether or not plaintiff is a 'seaman' for purposes of maintenance and cure are the same as those governing his right to recovery under the Jones Act." *Weiss v. Central R.R.*, *supra* at 311 (court's citations omitted). It is submitted that where one is a "seaman" for purposes of recovery under the Jones Act and for maintenance and cure, he is also a "seaman" as to seaworthiness.

<sup>93</sup> *Accord*, *Bailey v. City of N.Y.*, 55 F. Supp. 699 (S.D.N.Y. 1944), *aff'd.*, 153 F.2d 427 (2nd Cir. 1946).

<sup>94</sup> *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Beadle v. Spencer*, 298 U.S. 124 (1936). See generally *Diamond, Maritime Personal Injury; What Court, Judge or Jury*, 28 ALA. LAW. 387 (1967); *Dodd, The New Doctrine of the Supremacy of Admiralty Over the Common Law*, 21 COLUM. L. REV. 647 (1921).

<sup>95</sup> *The Steamboat New York v. Rea*, 59 U.S. (18 How.) 223 (1855).

<sup>96</sup> 346 U.S. 406 (1953). The court reiterated the rule originally laid down in *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918).

the Court reaffirmed its position, holding that in a maritime action for personal injuries, the seaman's rights were to be determined by admiralty rules and not by the laws of the state in which the cause of action arose. It should be noted, however, that in some areas, such as wrongful death actions, state statutes may be applicable.<sup>97</sup>

Oklahoma is among the many states that have enacted workmen's compensation legislation.<sup>98</sup> The Oklahoma Act, as previously mentioned, deprives an employer of the defenses of assumption of risk and contributory negligence,<sup>99</sup> and provides that the compensation provided for therein is an exclusive remedy as to the employments embraced.<sup>100</sup> The Act, although not presently applicable to shipowner and seaman,<sup>101</sup> could conceivably be amended to so apply. If our legislature were to take such action, would our Workmen's Compensation Act be a remedy to the exclusion of the maritime principles

<sup>97</sup> The *Harrisburg*, 119 U.S. 199 (1886). But note that the federal Death on the High Seas Act is applicable only to deaths occurring beyond a marine league from shore. 46 U.S.C. § 761 (1964). See generally *Carrie, The Choice Among State Laws in Maritime Death Cases*, 21 VAND. L. REV. 297 (1968); Annot., 1916A L.R.A. 1157. Note also that the exclusive characteristic of federal admiralty jurisdiction "... does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority ... nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of congress, nor work any prejudice to the characteristic features of the maritime law. ..." *The City of Norwalk*, 55 F. 98, 106 (S.D.N.Y. 1893), *aff'd*, 61 F. 364 (2nd Cir. 1894).

<sup>98</sup> OKLA. STAT. tit. 85 §§ 2-176 (1954), *as amended*.

<sup>99</sup> *Id.* § 12.

<sup>100</sup> *Id.*

<sup>101</sup> Note, however, that the Act does apply to "hazardous" employment on dredges. OKLA. STAT. tit. 85 § 2 (Supp. 1968).

previously discussed? The answer is clearly in the negative. As early as 1920, the Supreme Court held, in *Knickerbocker Ice Company v. Stewart*,<sup>102</sup> that Congress had no power to grant to the states the right to apply their workmen's compensation statutes in an admiralty situation. Congress had, in 1917, amended the "savings clause" of the Judiciary Act of 1789 (as amended) to expressly allow seamen to prosecute their rights under state workmen's compensation laws.<sup>103</sup> This was forbidden by the Supreme Court in *Stewart*:

[W]e think the enactment [of Congress] is beyond the power of Congress. Its power to legislate concern-

<sup>102</sup> 253 U.S. 149 (1920); cf. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

<sup>103</sup> Section 9 of the Judiciary Act of 1789 originally provided that federal district courts were to have original jurisdiction over admiralty matters "... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it ..." (Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76). After *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) was decided, Congress added to the "savings clause" the following language: "[A]nd to claimants the rights and remedies under the workmen's compensation law of any state ..." (Act of October 6, 1917, ch. 97, §§ 1, 2, 40 Stat. 395). This wording was defeated by the Supreme Court in the *Stewart* case. Congress tried again in 1922 by substituting the following language in place of the wording used in the 1917 amendment: "[A]nd to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any state ... of the United States, which rights and remedies when conferred by such law shall be exclusive ..." (Act of June 10, 1922, ch. 216, §§ 1, 2, 42 Stat. 634). But the Supreme Court, in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924) found even this language objectionable and struck it down. Congress thereupon gave up its attempt to force state workmen's compensation laws upon admiralty and in 1948 again amended the "savings clause" to virtually its original wording: "[S]aving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled." (Act of June 25, 1948, ch.

ing rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution. . . . The definite object of the [Constitutional] grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.<sup>104</sup>

The holding in *Stewart* was later extended to prohibit application of the state workmen's compensation statutes to certain persons other than the "master and members of the crew" engaged in maritime activity.<sup>105</sup>

It is appropriate, at this point, to mention the federal maritime workmen's compensation statute, known as the Longshoremen's and Harbor Worker's Compensation Act.<sup>106</sup> That Act, which provides compensation for certain injuries as well as occupational illness sustained by longshoremen and harbor workers, is exclusive as to the liability of the employer.<sup>107</sup> However, it is not applicable to "a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."<sup>108</sup> Furthermore, that Act provides that it

646, § 1333, 62 Stat. 931). This wording underwent a minor revision a year later and now reads "[S]aving to suitors in all cases all other remedies to which they are otherwise entitled." (28 U.S.C. § 1333 (1964)).

<sup>104</sup> 253 U.S. at 164. *But see* Alaska Packers Ass'n. v. Industrial Accident Comm'n., 276 U.S. 467 (1928) where it was held that in primarily local employments, the state workmen's compensation legislation could apply.

<sup>105</sup> *Washington v. W. C. Dawson Co.*, 264 U.S. 219 (1924). *See generally* note 103 *supra*.

<sup>106</sup> 33 U.S.C. §§ 901-950 (1964).

<sup>107</sup> *Id.* § 905. Note also that this section also abolishes the defenses of assumption of risk, contributory negligence and fellow-servant.

<sup>108</sup> *Id.* § 902 (3), 903 (a) (1).

will be applicable only if the disability occurs on navigable waters and then only if the state in question cannot lawfully provide workmen's compensation.<sup>109</sup> There necessarily results from the above some overlapping of state and federal compensation acts or, as the Supreme Court once put it, there is "that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation."<sup>110</sup> Employees working on barges and dredges have, in some instances, been held to be "members of the crew" (or seamen) and excluded from coverage by the Act.<sup>111</sup> In other instances, however, such workers have been held to be subject to the Act.<sup>112</sup> It is not difficult to envisage the problems which will doubtless arise in determining the appropriate theory of recovery for an injured (or ill) employee. Such employee may be classified as a "longshoreman" or as a "harbor worker" and therefore be covered by the federal Act or he may be afforded relief by the Oklahoma Act. If neither the federal nor Oklahoma Act is applicable, the employee may be a "seaman" and therefore entitled to protection under the general maritime concepts of maintenance and cure and unseaworthiness or under the Jones Act.<sup>113</sup>

<sup>109</sup> *Id.* § 903 (a). But an award of compensation under a state act will not preclude recovery under the federal act, the award of the state being credited against the federal award. *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409 (9th Cir. 1952).

<sup>110</sup> *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 253 (1942).

<sup>111</sup> See *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953), *cert. denied*, 346 U.S. 817 (1953); *Gahagan Constr. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948), *cert. denied*, 333 U.S. 876 (1948).

<sup>112</sup> See *Merritt-Chapman & Scott Corp. v. Willard*, 189 F.2d 791 (2nd Cir. 1951); *William Spencer & Son Corp. v. Lowe*, 152 F.2d 847 (2nd Cir. 1945).

<sup>113</sup> See generally *Torts Along the Water's Edge: Admiralty or Land Jurisdiction*, 1938 U. ILL. L.F. 95.

## PART IV

*Summary*

Oklahoma attorneys who are either engaged in the practice of law or sit on the bench of a state or federal court in Oklahoma, are naturally attuned to and familiar with Oklahoma law and practice. In order to recover in an ordinary negligence action, the plaintiff must plead and prove the defendant's negligence. The defendant will usually attempt to establish contributory negligence on the part of the plaintiff, knowing that to do so will completely exonerate his client from liability. With regard to workmen's compensation litigation in this State (where practice is restricted to the Industrial Commission with an appeal to the Supreme Court<sup>114</sup>), Oklahoma attorneys are aware of the fact that the defense of contributory negligence, as well as those of assumption of risk and the fellow-servant doctrine, have been abolished.

But with the arrival of the first commercial interstate water traffic in eastern Oklahoma within the next few years, and with it the first litigation involving seamen's injuries, Oklahoma judges and attorneys will be forced to alter some of their deeply ingrained legal conceptions. As pointed out in Part I above, the admiralty actions of maintenance and cure and unseaworthiness involve elements of liability without fault which make it unnecessary for the injured seaman to plead and prove negligence on the part of the shipowner.<sup>115</sup> Furthermore, the concepts of assumption of risk and contributory negligence have no place in either of the admiralty actions or in actions under the Jones Act, while the very unfamiliar comparative negligence rule is applicable to any litigation involving seamen's injuries. On the other hand, Okla-

<sup>114</sup> OKLA. STAT. tit. 85, § 26 (1954), *id.* § 29 (Supp. 1968).

<sup>115</sup> Note however that as previously discussed, negligence is an element which the seaman must plead and prove in an action brought under the Jones Act. See the text material in Part I and note 32 *supra*.



homa's Workmen's Compensation Act, having abolished the defenses of contributory negligence, assumption of risk and the fellow-servant doctrine, is in that respect similar to the Jones Act and the rules applicable to maintenance and cure and unseaworthiness. But, as previously noted, our Workmen's Compensation Act is not expressly applicable to seamen's injuries at this time;<sup>116</sup> and in the event our legislature amends the Act to cover seamen, the federal law will, nonetheless, control.

In addition, an Oklahoma plaintiff's attorney may feel assured that *res ipsa loquitur*, in its traditional form, will be virtually impossible to apply in a non-workman's compensation action between employee and employer. But again, the Oklahoma lawyer must adapt his thinking to admiralty, where a hybrid form of *res ipsa loquitur* has been employed by federal courts to infer a defendant's negligence under the Jones Act or to establish the unseaworthiness of a vessel.

Perhaps the most perplexing problem which will face Oklahoma's attorneys on both sides of the bench, will be determining exactly what law is applicable in a given situation. As we have seen, if the injured (or ill) individual is a "seaman" serving aboard a "vessel" on "navigable" waters, he most likely will be able to avail himself of the remedies of maintenance and cure, unseaworthiness, and the Jones Act, or a combination of these remedies. If that is the case, the admiralty rules and federal law will apply, in most instances, to the exclusion of state law including our Workmen's Compensation Act. But where the injured individual is not a "seaman," or he is not serving on a "vessel," or the waters involved are not "navigable," neither the admiralty remedies nor the Jones Act will apply, as the individual will probably be covered by the federal Longshoremen's and Harbor Workers' Compensation Act, perhaps in supplement to Oklahoma's Workmen's Compensation Act. And it should be noted that

<sup>116</sup> See note 101 *supra*.

federal workmen's compensation cases will be tried in federal district court rather than before our Industrial Commission. The facts of each case will, of course, determine the direction in which to proceed.

### *Conclusion*

The writer has not attempted in this article to consider in great depth any particular admiralty or federal remedy available to the injured seaman. For example, there has been no attempt to define exactly what constitutes "unseaworthiness," nor has there been a detailed analysis of the workings of the Jones Act. Each of these subjects, as well as others, have been and will be covered in separate papers by other writers. What the writer has attempted to convey is an awareness that, with the advent of commercial water traffic in Oklahoma, certain admiralty and federal law, heretofore unknown and unfamiliar to Oklahoma, will be applicable to the exclusion of traditional Oklahoma rules in the area of seamen's injuries.<sup>117</sup> The Oklahoma attorney should also become familiar with other admiralty and federal rules such as those concerning maritime liens and their priority,<sup>118</sup> the law of

<sup>117</sup> The Tulsa Port of Catoosa has advised the writer that, in the latest estimate of the U.S. Corps of Engineers, towboats from 600 to 5,000 h.p. and barges 195' x 35', 200' x 35', 250' x 52', and 175' x 26' are expected to ply the Arkansas River to Tulsa from such points as New Orleans, Chicago, Pittsburgh, St. Louis, and Tampa. It is anticipated that these vessels will transport up to 13.2 million tons of commodities annually including 3.9 million tons of petroleum and its products, 1.2 million tons of coal, and 3.1 million tons of iron and steel. Other products to be carried will be cars, grain, sulphur, sugar, crude rubber, salt, phosphate rock, and others. Letter from I. E. Chenoweth, Transportation Consultant of the Port of Catoosa to W. Jay Jones, April 7, 1969.

<sup>118</sup> See generally 1. M. NORRIS, *THE LAW OF SEAMEN* §§ 442-445 (2nd ed. 1962).

collision and of fault,<sup>119</sup> the Harter Act,<sup>120</sup> the Carriage of Goods by Sea Act,<sup>121</sup> and the law of Marine Insurance,<sup>122</sup> all of which may be applicable in Oklahoma. Also, in the event that alien ships and seamen should ply the waters of the Arkansas River and its tributaries, very complex problems of international choice of law<sup>123</sup> will be presented.

In view of today's federal and state workmen's compensation legislation as well as powerful maritime unions, the contemporary seaman can hardly be considered the "ward of the court" he once was.<sup>124</sup> It may be that the ancient admiralty remedy of maintenance and cure, and to a lesser degree the unseaworthiness remedy, are obsolete today insofar as they apply to non-ocean going craft in inland waters. But that will be the subject of other authors. It is submitted, however, that the admiralty and federal maritime rules, in whatever form they may be, should apply in all courts, both state and federal, in the interest of uniformity. Shipping is an international, or at least in its narrowest sense, an interstate industry which should not be fettered by a multitude of divergent local laws and procedures.

<sup>119</sup> See generally ROBINSON, ROBINSON ON ADMIRALTY §§ 107-116 (1939).

<sup>120</sup> 46 U.S.C. §§ 190-196 (1964).

<sup>121</sup> 46 U.S.C. §§ 1300-1315 (1964).

<sup>122</sup> See generally V. DOVER, A HANDBOOK TO MARINE INSURANCE (6th ed. 1962); W. RODDA, INLAND MARINE AND TRANSPORTATION INSURANCE (2nd ed. (1958).

<sup>123</sup> See generally ROBINSON, ROBINSON ON ADMIRALTY §§ 28-34 (1939).

<sup>124</sup> See *Jernigan v. Lay Barge Delta Five*, 296 F. Supp. 127 (S.D. Tex. 1969) for a very recent case in which the court refers to seamen as "wards of the court."